Leong Ken Min & Anor v Pelangi Kurnia Sdn Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22–135 OF 1999
CLEMENT SKINNER JC
19 OCTOBER 1999

Civil Procedure *— Stay of proceedings — Stay of civil suit pending completion of criminal trial — Discretion of court to stay civil proceedings — Plaintiff charged in criminal case based on facts similar with civil case — Plaintiff completed giving evidence in civil case — Order for declaration sought in civil case based on interpretation of agreement — Whether civil trial would be trying on issue of criminality*

The first and second plaintiffs were individuals who together with the first defendant, a company, were shareholders in the second defendant company. The second defendant undertook a housing development project and appointed Wai Construction Works, which was owned by the plaintiffs, as a sub contractor. The parties had some differences which was resolved through a settlement agreement where a funds manager was appointed to receive monies and make payments on behalf of the second defendant. However, as differences arose with regard to the settlement agreement, resulting in the bank account being frozen, the plaintiffs instituted this suit alleging breach by the defendants of the settlement agreement seeking, inter alia, a declaration that the management of the bank account was within the control of the funds manager. The defendants filed a counterclaim.

At the trial, the first and second plaintiffs completed giving their evidence before it was adjourned. When the trial resumed, counsel for the defendants informed the court that the first plaintiff had been charged with an offence of cheating under s 420 of the Penal Code which he pleaded not guilty and that the charge related to certain drainage claims made by the plaintiffs in this suit which the defendants assert were wrongly and fraudulently made. The defendants sought directions whether this suit could continue to be heard before the criminal charge against the first plaintiff was tried. The plaintiffs opposed any adjournment or a stay of this civil trial and sought to proceed with the civil trial. The plaintiffs contended that the charge against the first plaintiff only related to a sum of RM35,712.80 out of the sum of RM128,563.50 claimed by the plaintiffs for drainage works. The defendants urged the court not to proceed with the trial until the conclusion of the criminal case against the first plaintiff on the grounds that to do so would amount to a civil court trying an issue of criminality and that the facts relied upon to found the criminal charge were the same facts that give rise to the civil suit.

Held, directing the trial of the case to proceed:

(1) Even though the first plaintiff was charged for the offence of cheating which resulted in concurrent civil and criminal proceedings being brought in respect of some facts relevant to the

subject matter in this civil suit, the question of whether or not the court should stay the proceedings was clearly a matter at the discretion of this court which had control of the civil proceedings (see p 671D, G); *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 followed.

(2) The court would not be trying on an issue of criminality in this case as the main relief sought by the plaintiffs in this suit was for a declaration that the funds manager be authorized to control and manage the funds of the second defendant and the determination of that question turned on the interpretation of the terms of the settlement agreement. Further, the facts which the plaintiffs relied upon to establish their right to such relief were not the same as what the prosecution in the criminal case will rely upon (see p 672A).

(3) There was no issue of a miscarriage of justice occurring in the criminal trial due to the first plaintiff having to reveal his defence as the first plaintiff had already completed giving his evidence. The first plaintiff also did not complain that his rights were infringed if this court went on with this civil suit nor that he would suffer any prejudice thereby (see p 672B–C).

(4) The court took into account the fact that the criminal case was not even fixed for hearing, and that this case that was being heard also involved the second plaintiff, against whom no charges had been brought. The court also took into account the fact that in their submissions, both counsels agreed that any finding of fact made, whether in the civil trial or in the criminal trial would not bind the other court in either trial (see p 672C–D).

[Bahasa Malaysia summary

Plaintif pertama dan plaintif kedua merupakan individu-individu yang bersama dengan defendan pertama, sebuah syarikat, adalah pemegang-pemegang saham di dalam syarikat defendan kedua. Defendan kedua telah membuat satu projek pembangunan perumahan dan melantik Wai Construction Works, yang dimiliki oleh plaintif-plaintif, sebagai sub-kontraktor. Pihak-pihak telah mempunyai pertikaian yang telah diselesaikan melalui satu perjanjian penyelesaian di mana pengurus kewangan telah dilantik untuk menerima wang dan membuat pembayaran bagi pihak defendan kedua. Bagaimanapun, disebabkan pertikaian yang timbul berhubung dengan perjanjian penyelesaian tersebut, yang telah mengakibatkan akaun bank dibekukan, plaintif-plaintif telah memulakan guaman ini mendakwa wujudnya pelanggaran oleh defendan-defendan terhadap perjanjian penyelesaian dengan memohon, antara lain, satu deklarasi bahawa pengurusan akaun bank tersebut adalah di dalam kawalan pengurus kewangan. Defendan-defendan telah memfailkan satu tuntutan balas.

Semasa perbicaraan, plaintif pertama dan kedua habis memberikan keterangan sebelum ia ditangguhkan. Apabila perbicaraan diteruskan semula, peguam untuk defendan-defendan telah memberitahu mahkamah bahawa plaintif pertama telah dituduh untuk suatu kesalahan menipu di bawah s 420 Kanun Keseksaan di mana beliau mengaku tidak bersalah dan tuduhan tersebut adalah berkaitan dengan beberapa tuntutan penyaliran yang dibuat oleh plaintif-plaintif di dalam tindakan ini di mana defendan menegaskan telah dibuat secara salah dan fraud. Defendan-defendan telah memohon arahan-arahan sama ada tindakan ini boleh terus didengar sebelum tuduhan jenayah terhadap plaintif pertama dibicarakan. Plaintif telah menentang sebarang penundaan atau penangguhan perbicaraan sivil ini dan telah memohon untuk memulakan perbicaraan sivil. Plaintif-plaintif menegaskan bahawa tuduhan terhadap plaintif pertama hanya berkaitan dengan jumlah RM35,712.80 daripada jumlah RM128,563.50 yang dituntut oleh plaintif-plaintif untuk kerja-kerja penyaliran. Defendan-defendan telah mendorong mahkamah supaya tidak memulakan perbicaraan tersebut sehingga berakhirnya kes jenayah terhadap plaintif di atas alasan bahawa, untuk berbuat demikian, ia akan terjumlah kepada mahkamah sivil cuba membicarakan suatu isu jenayah dan bahawa fakta-fakta yang digantung untuk mendasarkan pertuduhan jenayah adalah fakta-fakta yang sama yang membangkitkan guaman sivil tersebut.

Diputuskan, mengarahkan perbicaraan untuk kes ini diteruskan:

(1) Walaupun plaintif pertama telah dituduh untuk kesalahan menipu yang menyebabkan prosiding sivil dan jenayah dibawa pada waktu yang sama berkenaan dengan fakta yang berkaitan dengan subjek perkara guaman sivil ini, persoalan sama ada atau tidak mahkamah patut menangguhkan prosiding-prosiding adalah jelas suatu perkara budi bicara di pihak mahkamah ini yang mempunyai kawalan ke atas prosiding sivil (lihat ms 671D, G); *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 diikut.

(2) Mahkamah tidak akan membicara berkenaan dengan isu jenayah di dalam kes oleh kerana relif utama yang dipohon oleh plaintif-plaintif di dalam guaman ini adalah untuk suatu deklarasi bahawa pengurus dana diberi kuasa untuk mengawal dan mengurus dana-dana defendan kedua dan penentuan persoalan tersebut beralih kepada penafsiran terma-terma perjanjian penyelesaian tersebut. Selanjutnya, fakta-fakta yang digantung oleh plaintif-plaintif untuk menunjukkan hak mereka kepada relif sedemikian adalah tidak sama seperti apa yang digantung oleh pihak pendakwaan di dalam kes jenayah tersebut (lihat ms 672A).

(3) Tiada isu berkenaan dengan salah laksana keadilan di dalam perbicaraan jenayah oleh kerana plaintif pertama yang perlu mendedahkan pembelaannya sebagai plainitf pertama telah pun

habis memberikan keterangannya. Plaintif pertama juga tidak mengadu bahawa haknya telah dilanggar jika mahkamah ini terus dengan guaman sivil ini atau beliau akan mengalami sebarang prejudis oleh kerananya (lihat ms 672B–C).

(4) Mahkamah telah mengambil kira fakta bahawa kes jenayah tidak ditetapkan langsung untuk perbicaraan dan bahawa kes ini yang sedang didengar juga melibatkan plaintif kedua, di mana tiada pertuduhan-pertuduhan telah dibawa. Mahkamah juga mengambilkira fakta bahawa di dalam hujahan-hujahan mereka, kedua-dua peguam bersetuju bahawa apa-apa penemuan fakta yang dibuat, sama ada di dalam perbicaraan sivil atau jenayah, tidak akan mengikat mahkamah lain di dalam mana-mana perbicaraan (lihat ms 672C–D).]

Notes

For cases on stay of proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4272–4332.

Cases referred to

Dato' Ding Lian Cheon v Yap You Jee & Ors [1999] 3 MLJ 209 (refd)
Jefferson Ltd v Bhetcha [1979] 2 All ER 1108 (folld)
KM Nathersahib & Anor v Meyers Brothers [1940] MLJ 252 (refd)

Legislation referred to

Penal Code s 420

Francis Goh (*KC Eg* with him) (*Rajah Lau & Assoc*) for the plaintiffs.
Paul Kam (*Andrew Chin* with him) (*Liew Hazalina*) for the defendants.

Cur Adv Vult

Clement Skinner JC: This trial commenced on 6 July 1999 and thereafter continued to be heard on 7 July, 10 August and 11 August 1999 when it was adjourned to 22, 23 and 27 September 1999 for continued hearing.

When the trial resumed, I was informed by counsel for the defendants that there has been a 'development' concerning the parties to this suit by reason whereof the defendants were seeking the court's direction on whether or not the trial should proceed. The 'development' was this: on 25 August 1999, the first plaintiff was charged with an offence of cheating under s 420 Penal Code at the Magistrates' Court, Sungei Siput. The first plaintiff pleaded not guilty to the charge and the case was fixed for mention again on 1 October 1999 pending representation by counsel for the first plaintiff to the Attorney General's chambers. Counsel for the defendants informed the court that the charge preferred against the first plaintiff relates to certain drainage claims made by the plaintiffs in this suit and which the defendants assert are wrongly and fraudulently made. In these

A circumstances, counsel for the defendants sought directions whether this suit could continue to be heard before the criminal charge against the first plaintiff was tried.

The plaintiffs oppose any adjournment or stay of this civil trial and wish to have the same proceeded with.

B To put matters into perspective, the background facts must be referred to, if only briefly.

The first and second plaintiff are individuals who together with the first defendant, a company, are shareholders in the second defendant company which is undertaking a development project known as Perkampungan Tersusun Kledang Fasa Satu, Sungei Siput, ('the housing project') on a C joint venture basis with a company called Pelangi Kurnia (M) Sdn Bhd ('Kurnia'). Apparently, the second defendant appointed a firm called Wai Construction Works ('Wai Construction') as a sub contractor to construct and complete a total of 104 units of bungalow lots in the housing project in accordance with terms stated in a letter of appointment and acceptance D dated 11 September 1996. Similarly, by a letter dated 15 April 1997, the second defendant appointed Wai Construction to construct and complete the drainage works in the housing project. The proprietors of Wai Construction are the first and second plaintiff.

In the course of the housing project being implemented, differences arose between the shareholders in the second defendant (the first dispute), E as a result of which, the housing project came to a standstill eventually leading to the second defendant and Kurnia commencing legal proceedings against the first and second plaintiff in Ipoh High Court Suit No 22–154–1998 (the first court action).

On 2 October 1998, the parties to the first court action entered into an F agreement (the settlement agreement) to settle their differences relating to the first dispute leading to a court order being made on 2 October 1998 recording the settlement. One of the terms of the settlement agreement was that a 'funds manager' be appointed so that all monies and other payments due to the second defendant would be received by the funds manager and maintained in the second defendant's bank account at Sime Bank Bhd, G Sungei Siput Branch (the said bank account). The funds manager would also make payment out of the monies maintained in the said bank account to all creditors of the second defendant in accordance with certain terms and conditions set out in the settlement agreement. It was also a term of the settlement agreement that Wai Construction shall resume and complete the H works subcontracted to it, namely, the construction of the houses and construction and completion of the drainage works in the housing project. As mentioned earlier, one of the functions of the funds manager was to pay creditors of the second defendant. One of the creditors identified in the first schedule to the settlement agreement was Wai Construction with a sum of RM453,571.50 payable to it for both building and drainage works.

I Following the entering of the settlement agreement and the appointment of the funds manager, Wai Construction was on 3 November 1989, given possession of the construction site of the housing project.

However, by 27 November 1998, differences arose between the parties to the settlement agreement regarding the release of monies by the funds manager in respect of the housing project resulting in the said bank account being frozen at the request of one Chew Keng Chee, a director of the second defendant. As a result of these differences the plaintiffs instituted this suit alleging breach by the defendants of the settlement agreement seeking, inter alia, a declaration that the management of the said bank account is within the control of the funds manager. The defendants say that the said bank account was frozen because the funds manager had in breach of the settlement agreement made payment out to various creditors including Wai Construction, who was paid a sum of RM305,278.00 for construction works and RM128,563.50 for drainage works on 11 November 1998 and 12 November 1998 respectively. The defendants have filed a counterclaim in which they allege that the first and second plaintiff have through Wai Construction made claims for payment which are unreasonable and unjustified, and have received payments knowing their claims to be untrue. The defendants accordingly claim the return of the above mentioned monies paid out to the first and second plaintiff. So much for the background facts.

The present position or status of the civil proceedings before me is that both the first plaintiff and second plaintiff have finished giving their evidence. Counsel for the plaintiffs informs me that he wishes to call the funds manager to give evidence next. As opposed to that, a date has not even been fixed for the trial of the criminal charge and there is no knowing when that case will be concluded. Counsel for the plaintiffs also draws attention to the fact that the charge against the first plaintiff only relates to a sum of RM35,712.80 out of the sum of RM128,563.50 claimed by the plaintiffs for drainage works.

Counsel for the defendants urges me not to proceed any further with this trial until the conclusion of the criminal case against the first plaintiff on the grounds that to do so would amount to a civil court trying an issue of criminality. It is counsel's submission that the facts relied upon to found the criminal charge are the same facts that give rise to the civil suit. Counsel for the defendants referred to the case of *KM Nathersahib & Anor v Meyers Brothers* [1940] MLJ 252 in support of his submission. That was a case in which there had been considerable dealings between the plaintiffs and defendants there, as a result of which the plaintiffs owed the defendants a large sum of money. The defendants considered that the plaintiffs not merely owed them money but had also in their dealings committed a criminal offence as a result of which at the defendants instance, the first plaintiff was arrested and charged with cheating. The plaintiffs alleged that the defendants agreed to compound the prosecution in consideration of the plaintiffs executing 35 promissory notes which the plaintiffs did whereafter the prosecution was withdrawn with the assent of the deputy public prosecutor. The plaintiffs then brought a suit claiming, inter alia, a declaration that the 34 promissory notes were founded on an illegal consideration and therefore not binding on the plaintiffs. The defendants counterclaimed for the amount they alleged still due to them. In giving the

A defendants judgment on their counterclaim, Barnett-Lennard J, commenting on the fact that the civil suit was being heard before the prosecution of the plaintiffs on the criminal charge stated that 'It is a wise rule of public policy that a jury shall pass a verdict at the assizes before a judge sitting alone tries the issue of criminality'. It is the foregoing passage that counsel for the defendants relies upon.

B

In the recent case of *Dato' Ding Lian Cheon v Yap You Jee & Ors* [1999] 3 MLJ 209, the plaintiff, alleging that he had been cheated of his money by the defendants, lodged a police report as a result of which the defendants were charged in the Johor Bahru Sessions Court under s 420 of the Penal Code. The plaintiff there then commenced a civil action against the C defendants to recover his money after which he applied to stay the civil proceedings pending the completion of the criminal proceedings which had reached the stage of the prosecution having closed its case by the time the application for stay was heard.

In the course of deciding whether to grant a stay, and in finally granting D one, Abdul Malik Ishak J, reviewed the decision of the courts in several Commonwealth jurisdictions concerning cases where concurrent civil and criminal proceedings had been brought in respect of the same subject matter and applied the approach taken in *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA). A reading of that case shows that the English Court of Appeal decided that a court having control of civil proceedings could in the E exercise of its discretion, stay those proceedings if it appears to the court that justice so required having regard to the defendants' right of silence in relation to concurrent criminal proceedings and that an important factor to be taken into account by the court in deciding whether to grant a stay was whether there was a real and not merely notional danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of F justice in the criminal proceedings.

Reverting to the position that now presents itself before me; the charging of the first plaintiff for the offence of cheating has resulted in concurrent civil and criminal proceedings being brought in respect of facts relevant to part only of the subject matter in this civil suit. As stated in the G case of *Jefferson Ltd v Betcha*, whether or not I should stay these proceedings is clearly a matter at the discretion of this court which has control of these civil proceedings; and keeping in mind what is stated in that case regarding how that discretion is to be exercised, I now direct my mind to that question.

H Even though counsel for the defendants submitted that the criminal charges against the first plaintiff are founded on the same facts as in this suit, he has not identified what those facts are. It should not be forgotten that the whole of the plaintiffs' drainage claim came to RM128,563.50 whereas the criminal charge relates to only RM35,712.80 thereof. This in itself suggests that only some of the facts relating to the drainage claim may, if at all, be I relevant in the criminal charge. It should also be noted that the main relief sought by the plaintiffs in this suit is a declaration that the funds manager is authorized to control and manage the funds of the second defendant. The

determination of that question turns to a large extent on the interpretation of the terms of the settlement agreement; and as such, it is my view that the facts which the plaintiffs rely upon here to establish their right to such relief are not the same as what the prosecution in the cheating charge will rely upon. This also means that this court will not be trying the issue of criminality as alleged. I also find that the question of a miscarriage of justice occurring in the criminal trial because the first plaintiff will be required in these proceedings to reveal his defence, is a non issue as the first plaintiff has already completed giving his evidence and the first plaintiff does not complain that any of this rights are being infringed if this court goes on with this civil suit. Neither has he complained that he will suffer any prejudice thereby. I also take into account the fact that whereas the criminal case is not even fixed for hearing, this case which is well into being heard also involves the second plaintiff as well, against whom no charges have been brought. Finally, I take into account the fact that in their submissions, both counsels agree that any findings of fact made, whether in this civil trial or in the criminal trial would not bind the other court in either trial. To conclude, all the above facts show that in the particular circumstances of this case, the interests of justice do not require that these proceedings should be adjourned or stayed until the conclusion of the criminal trial. I accordingly direct that this trial proceed.

Trial directed to proceed.

Reported by Chin En Tek